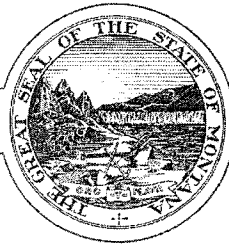


DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

SENATE TAXATION
EXHIBIT NO. 4
DATE 3-19-09
BILL NO. SB507
1625 ELEVENTH AVENUE



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To: Senator Story
Joe Kolman

From: Mary Sexton, DNRC

A handwritten signature in cursive script, likely belonging to Mary Sexton.

Date: March 12, 2009

RE: LC 46

I'm including several concerns that we have with the draft bill. We've included recommendations as well. My staff and I would be glad to visit with you about these if you wish.

LC 46: Comments, potential issues and concerns.

New Section 1. Legislative finding

- (1) (d) exempts uses and users from paying "past rentals" on uses in navigable rivers where an adjacent land owner has paid property taxes on the land.

ISSUE: This section implies that the payment of property tax satisfies an obligation to compensate the trusts for the use of trust lands. Payment of taxes is unrelated to compensation for uses of trust lands. In fact, this section violates both Art. X, Section 11 of the 1972 Montana constitution and Section 77-1-125, MCA. Montanans for the Responsible Use of the School Trust v. State ex rel. Board of Land Comm'rs (Montrust I), 296 Mont. 402, 989 P.2d 800 (1999) held that statutes which interfere with the State's duty to obtain the full market value for the use of school trust lands violates the Montana Constitution and the Enabling Act, Act of February 22, 1889. The legislature is forbidden from granting rights in school trust lands to benefit third parties to the detriment of the school trust's beneficiaries.

We recommend that Section one be stricken from the bill.

New Section 2. Definitions

- (2) Full market value- means an amount calculated based upon the area of a footprint and fair market value of adjacent uplands.

ISSUE: Section 2 limits the land boards authority in determining "full market value" as provided for in Art. X, Section 11 of the 1972 Montana constitution. In the case of PPL Montana, et al. v. State of Montana, the courts accepted "full market value" for the use of navigable rivers for the purpose of hydroelectric generation as net benefits method. This methodology was adopted by the land board for this use. Additionally, hydroelectric structures are managed under Title 77 part 2, MCA and should be excluded from LC 46.

We recommend exempting hydroelectric facilities from this definition and inserting language such as "unless otherwise determined by the Board", in order to grant the board discretion in these matters.

New Section 3. Historic use of navigable river beds.

(7) (c) for which the applicant can show an easement obtained from a state agency prior to the effective date of this act.

ISSUE: DNRC is unaware of any instance where any agency, other than DNRC and the State Board of Land Commissioners, has issued an easement upon a navigable waterway. If another agency issued such an easement, it would not be effective. The Legislature does not have authority to ratify a void conveyance. Only the Land Board can convey an easement in a state-owned water way.

We recommend that Section 3(7)(c) be stricken from the bill.

New Section 6. Easement transferable – relocation of structure – increased footprint.

- (2) (ii) allows the holder of a lease, license or easement to increase the size of the footprint if the increase is necessary to accomplish the purpose for which the lease, license or easement provided that the holder pay full market value.

ISSUE: Section six directly interferes with the constitutional authority of the State Board of Land Commissioners to determine when to convey interests in state school trust lands.

We recommend that Section six be stricken from the bill.

New Section 7. Board to adopt rules

This section requires the board to adopt rules.

- (1) determine the location of rivers that are navigable for title purposes.

ISSUE: Disputed titles to real property are adjudicated by district courts. In order to resolve the title to navigable riverbeds, islands, and abandoned channels - and place the boundary between state and private ownership, there are typically four necessary steps: 1) a review and analysis of the chains of title for the disputed lands must be conducted to determine all potentially affected surface and mineral property owners; 2) a geo-technical analysis of the historic sequential change in the forms of the riverbed is conducted by an expert hydrogeologist to determine areas potentially owned by the state locate of the boundary between state and private ownership; 3) a professional survey of the ownership boundary is conducted; and 4) litigation is filed and conducted to perfect the ownership claim, and obtain a judgment.

The department currently conducts title adjudications when ownership disputes create the need to resolve and defend the state's ownership. The estimated cost for conducting the above referenced steps to resolve the title to a navigable riverbed within a section of land is as follows:

1)	Title research (surface & mineral estate)	\$ 5,000
2)	Expert analysis	\$15,000
3)	Professional survey	\$20,000
4)	Legal time (120 hrs @ \$75/hr)	\$ 9,000

Total per section cost:

\$49,000

The state considers approximately 3,300 miles of rivers in Montana to meet the Federal criteria for navigability, and be subject to state ownership.

Assuming that the Land Board and the department could establish a navigable riverbed adjudication program through the hiring of professional staff and accomplish mass adjudications for approximately one-half the above cost (\$24,500 per section), the total cost to comply with Section 7 of the proposed legislation would equal (3,300 miles) X (\$25,000 per mile) = \$82.5 million